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CASES AND MATERIALS ON FAMILY LAW

Volume 1

EDITED BY

BERNARD GREEN

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Table of Contents

CHAPTER ONE: INTRODUCTION

I. The Constitutional Framework: Division of Powers and Charter of Rights 2

Canadian Charter of Rights and Freedoms 3
U.S. Bill of Rights 4
Note on Impact of Charter of Rights on Family Law 4

II. The Legislative Framework 7

III. The Institutional Framework 7

A. The Courts 7

B. Other Agencies 8

C. The Lawyer 8

Reisman, "Beyond the Call of Obvious Duty" 8
Mnookin & Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" 11

IV. Some Views on the Family and Marriage 14

Eekelaar, Family Law and Social Policy 14
Sage, "Dissolution of the Family under Swedish Law" 22
Ryan, "Maintenance Obligations in a New Legal Concept of Marriage" 24
Posner, Economic Analysis of the Law 28

CHAPTER TWO: FORMATION OF THE FAMILY UNIT AND ANNULMENT

I. Introduction 33

II. The Constitutional Issue 34

Bushnell, "Family Law and the Constitution" 34

III. The Statutory Conditions 35

A. Licence and formalities 35
Marriage Act 35

B. Effect of failure to comply with statutory conditions 39

Marriage Act 39
Friend, "Common Law Marriage in Ontario" 40
Alspector 40
Friend, "Common Law Marriage in Ontario" 46

C. Age and parental consent 48
Marriage Act 49
Re Fox 50

IV. The Conditions Imposed by the Common Law 52

A. Introduction 52

B. A man and a woman 52

C. Who are free to marry 53

Marriage Act 54

D. Who consent to marry each other 57

(1) Mental Capacity 57

Marriage Act 57
Meilen v. Anderson 57
Chertkow v. Feinstein 58
Whitaker v. McNeilly 61
Webb 63
Re McGill 63

(2) Mistake as to the nature of the ceremony 66

Jawani 66

(3) Mental reservations 68

Gardner 68
Iantsis 70

(4) Duress 71

Thompson 71
Truong (Malia) 76

(5) Fraud 77

Moss 77
H. v. C 78

E. And who are able to consummate the marriage 80

(1) What constitutes consummation 80

Baxter 80
Wilkinson 80

(2) Inability to consummate 81

(a) Physical 81

Foster 81

(b) Invincible repugnance 83

Heil 83
Greenlees 86

Gajamugan 88
Foisy 88

V. Defences to a Nullity Action: Approbation or Insincerity 91

Hahlo, Nullity of Marriage in Canada 91

A. Knowledge 93

G. v. G. 93
B. v. B. 96

B. Conduct 97

R.E.L. 97
W. v. W. 101

C. Delay and improper motive 105

Clifford 105
Norman 107

D. The effect of petitioner's own impotence 109

Pettit 109

IV. The Nullity Decree 112

A. Jurisdiction and other matters 112

B. Conflicts problems 112

C. Economic consequences 112

D. Children 112

CHAPTER THREE: DIVORCE

I. Grounds 113

A. General 113

Green, "The Divorce Act of 1968" 114
Divorce Act 114

B. Immediate relief: the fault grounds 116

(1) Adultery 116

(a) What it is 116

Orford 116
Dennis 119

(b) Proving adultery 121

(i) Standard of proof 121

(ii) Methods 121

1. Physical condition 121

2. Circumstances 121

Little 122

3. Admissions 127

Divorce Act 127
Evidence Act 128
Ewasiuk 129
Veysey 130

4. Other decrees 131

Coles .....

(2) Other sexual misconduct 133

Divorce Act 133
G. v. G. 134
Guy 136
T. v. T. and W. 137

(3) Cruelty 139

Divorce Act 141

(a) Relevance of the common law alimony standard 141

N. v. N. 141

(b) Grave and weighty conduct 147

Knoll 147
Feldman 148
Wittstock 150
Luther 154
Shumila 156
Hattie 160
Elbaz 161
Rishel 163

(c) The relevance of intention 164

Williams 164
Anderson 170

(d) The time problem 173

C. Delayed relief: marital breakdown 173

Divorce Act 173

(1) Imprisonment 174

(2) Addiction 174

(3) Disappearance 175

(4) Non-consummation 175

Chirayath 175

(5) Living separate and apart in the absence of other grounds 177

(a) "Separate and apart" 178

J.B. v. A.W.B. 178
Deslippe 182
Boechler 183
Lachman 184

(b) Desertion 188

(i) Without just cause 188

Sullivan 188
G. v. G. 192
Bird 194
Slon 197

(ii) ...And with the intention to remain apart permanently 198

Lilley 199

(iii) The problem of mutual desertion 201

Price 201

(iv) Termination of desertion 203

Digiacinto 203
Richards 204
March 207

D. Proposals for reform 208

Goldstein & Gitter, "On Abolition of Grounds for Divorce" 208

II. Bars and Defences 213

A. The possibility of reconciliation 213

Divorce Act 213

Irving & Irving, "Conciliation Counselling In Divorce Litigation" 214

B. Absolute bars applicable to all grounds 217

(1) Collusion 217

Divorce Act 217
Sopinka, "The Divorce Act 1968, Collusion Confined" 218
Gillett 223

(2) Fraud 224

Fromovitz 224

C. Discretionary Bars 228

(1) Connivance 228

Divorce Act 228
Report of the Special Joint Committee on Divorce 228
Berger 229

(a) Consent 231

T. v. T. 231

(b) The problem of investigation 233

Pearl 233
Hechter 235

(c) Termination of connivance 240

Godfrey 240

(2) Condonation 243

(a) Introduction 243

Divorce Act 244

(b) The common law 245

Knowledge, forgiveness and re-instatement 245

Leaderhouse 246
Aucoin 252

(c) The effect of the Divorce Act 254

Divorce Act 254
Boivert v. Marineau 255
Nolan 259
Ross 259
Blackburn 260
Brown 261
Blue 263

(3) The exercise of discretion 265

Divorce Act 265
Blunt 265

D. Special bars applicable only to s. 4 grounds 266

Divorce Act 266
Raggett 267
Savage 269

E. The problem of insanity 270

B. v. B. 270

III. Nature and Consequences of Divorce 272

A. Jurisdiction 272

Divorce Act 272

B. Recognition 274

Divorce Act 274

C. Consequences 274

(1) Status 274

Divorce Act 274
Baia 275
Rivera v. Barahona 276

(2) Economic 278

(3) Children 278

(4) Costs 278

Bregman 278

Andrews 281

CHAPTER FOUR: ECONOMIC RELATIONS BETWEEN "SPOUSES"

I. Introduction 284

II. Ownership of Property 286

A. Introduction 286

Law Reform Commission of Canada, Family Property 286
Zuijdwijk, A Note on the Standard Property Regime in Quebec 299

B. The law prior to the F.L.R. Act; the law after: the use of trusts 304

Murdoch 305
Rathwell 313
Pettkus v. Becker 314
Marvin 324

C. The F.L.R. Act 325

(1) Provisions applicable to determining ownership of all types of assets 325

(a) Standing 325

(b) Trusts and presumptions of trust 326

(c) Private agreements: domestic contract 327

(2) Family assets and division of family and non-family assets 327

(a) What is a family asset? 328

(b) Powers of the court in dividing property 329

(i) General 329

(ii) In relation to family assets 330

(iii) In relation to non-family assets 331

D. The case law 332

(1) What is a family asset? 332

Bregman 332
Re Leatherdale 336
Ling 337

(2) When will the court make an unequal division of family assets? 338

(a) The effect of gifts 338

Silverstein 338
Bregman 342
Weir 343
Ling 344
Piskor 345

(b) Equal division inequatable in the circumstances 346

Weir 346

(3) When will the court make a division of non-family assets? 348

(a) The impact of s. 4 348

Silverstein 349
Bregman 350
Re Young 352
Collville-Reeves 353
Leatherdale 355

(b) The impact of s. 8 358

Silverstein 358
Re Young 359
Leatherdale 360
Van de Mark v. Walton 363
Kiss v. Palachik 364

(4) The problem of agreements between the parties 365

Family Law Reform Act 366

(a) Agreements not in compliance with s.54 367

Seibt 367
Burton 368
Miller 369

(b) Agreements that are formally valid by s. 54 371

Deroon 371
Couzens 372
Mirus 373
Lamers 374

III. Mutual Duty of Maintenance 375

A. While Marrie or Cohabiting 375

(1) The law prior to the F.L.R. Act of 1978 375

(2) The Family Law Reform Act of 1978 376

B. On Breakup of Marriage or Cohabitation 376

(1) Who can claim: the problem of "common law" spouses 376

Family Law Reform Act 376
Re Stoikiewicz and Filas 377
Warwick v. Ministry of Community & Social Services 379
Sanderson v. Russell.....381

(2) When can claim be made? 382

(a) Nullity 382

(b) Divorce 383

Divorce Act 383
The Interaction of the Divorce Act and the F.L.R. Act 384
Note on the Powers of the Divorce Court 384

(c) On death of one of the parties 386

Succession Law Reform Act 386

(3) What types of order can be made 387

(a) Non-monetary 387

The special problem of possessory rights in the matrimonial home 388

(i) Definition of matrimonial home 388

(ii) Protection accorded a spouse in the matrimonial home 389

(iii) Powers of court to alter occupancy rights 389

Janssen 390
Partition Act 392

(b) Money Awards : Types 393

(i) Periodic payment orders 393

Family Law Reform Act 393
Divorce Act 393

(ii) Lump sum 394

(iii) Secured 394

Family Law Reform Act 394
Divorce Act 394

(4) Factors affecting mometary awards 395

(a) Introduction 395

Law Reform Commission of Canada, Maintenance or Divorce 395
Family Law Reform Act 401
Divorce Act 403

(b) When will a court order that a lump sum be paid 403

Murdoch 403
Shaffran 405
Feldman 407
Chaffery 408
Brett 408

(c) Factors (Other than conduct) affecting quantum of award 411

Davis 411
Williams 414
Barnard 416
Silverstein 417
D. v. D. 421
Cohen 422
Elasoff 424
Cure 426

(d) The significance of Conduct 427

(i) Under the F.L.R. Act 427

West 427
McCabe 429
Rocha 431
C. v. C. (No. 2) 432

(ii) Under the Divorce Act 433

Murdoch 433

(5) Variation of awards 435

Family Law Reform Act 435
Divorce Act 435
Harrington 436
Johnstone 438
McQuilkin v. Dawson 441
Neal 443
Jancov 445
Gergely 447
Gigantes 449

C. Special Problems: Contracting Out, Welfare and Problems of Federalism 450

(1) Contracting out of maintenance 450

(a) While parties are alive 450

(i) During cohabitation or upon separation 450

Family Law Reform 450
Mance 451

(ii) Where marital status is terminated by divorce 453

Newman 453

Note on separation agreements 460

(b) Contracting out of claims against a spouse's estate 460

Family Law Reform Act 460
Succession Law Reform Act 460

(2) Welfare

General Welfare Assistance Act 461
Annual Report, Ministry of Community and Social Services for the Fiscal Year Ending March 31, 1982 464
Family Benefits Act 465
Annual Report, Ministry of Community and Social Services for the Fiscal Year Ending March 1982 469
Annual Report, Ministry of Community and Social Services for the Fiscal Year Ending March, 1981 470
Diamond, "Philosophy of Welfare" 471

(3) Problems of federalism 476

Sniderman 477

CHAPTER FIVE: CHILDREN

I. Introduction 479

Children's Law Reform Act 480
Family Law Reform Act 481
Succession Law Reform Act 481
Divorce Act 482

II. Proving and Disproving Parenthood 482

Children's Law Reform Act 482
Re H and H 486
Re Rhan 490
Ministry of Community and Social Services and Tolls 494

III. The Right (or Privilege) to Raise or See One's Children: Guardianship, Custody, Care and Control, Access 496

A. Introduction 496

B. Private Disputes 497

(1) Custody 497

(a) Legislative framework 497

Children's Law Reform Act 497
Divorce Act 504
Matrimonial Causes Act 505

(b) The general principles: what the academics have said 507

Foster and Freed, "Child Custody".....507
Katkin, Bullington and Levine, "Above and beyond the Best Interests of the Child 512
Mnookin, "Child-Custody Ajudication: Judical Functions in the Face of Indeterminacy 519

(c) Powers of the court 544

(i) Who has standing to apply for coustody 544
Smith v. Sears 545

(ii) Award to a person not a party to the action 547

Re Fulford and Townshend 547

(iii) Joint custody order 549

Kruger 549
Fontaine 558
Zwicker v. Morine 559
Field 560

(iv) The effect of an agreement between the parties 563

Children's Law Reform Act 563
Family Law Reform Act 564
Colter 565

(d) Interim custody 565

Children's Law Reform Act 565
Divorce Act 566
Papp 566

(e) Permanent custody 568

(i) The impact of conduct 568

Divorce Act 568
Children's Law Reform Act 569
Note on "Kidnapping".....569
Cooney 570
Bezaire 574

(ii) Race 578

Hayre 578
Singh 580

(iii) Tender years and plans 581

MacDonald 581
Talsky 583
Mireault 588
Wakaluk 590
Romeyko 595
Bayda, "Procedure in Child Custody Adjudication 597

(f) Custody after death of natural guardian 602

Children's Law Reform Act 602

(2) Disputes between parents and third parties 603

Hepton v. Maat 603
J. v. C. 605
Re Moores and Feldstein 610
Delvenne v. Nabbie 618

(3) Access 621

Children's Law Reform Act 621
Ader 623
Boileau 628
Adoption of a Child by M 630

C. Disputes involving the state or a coercive agency 633

(1) State intervention: the "pure welfare" approach 633

Manson, "The Ontario Child Welfare Act of 1965" 633
Child Welfare Act 639

(a) General 639

(b) Jurisdiction 640

(c) Process 644

(d) Powers on making a finding 649

(e) Accountability: review and appeals 651

Richardson, Unpublished paper 657
Ministry of Community and Social Services, 50th Annual Report 663
Re C.C.A.S. and Pamela M. 665
Re Brady Infants 675
C.A.S. of Winnipeg v. Molyneux and Porteous 677
Tom v. Winnipeg C.A.S. 682
Note, "The Custody Question and Child Neglact Hearings" 684
Re Cordes - Saathoff at al and C.C.A.S. of Metro Toronto 691

(2) State intervention: the quasi-welfare approach 694

Juvenile Delinquents Act 694
Young Offenders Act 698

IV. Adoption 712

A. The statutory scheme 712

Child Welfare Act 712
Ministry of Community and Social Services, 48th Annual Report 727

B. Consent of natural parents 728

O'Connor v. A. & B 728
Director of Man. Child Welfare v. Y. 730
L and L v. Legal A.d 2 Manitoba 733
Re Windsor 733
Re Sobering et al and Sergant 737

C. The religious factor 739

Petch, "Re Lamb: Religious considerations in Ontario Adoptions" 739
Re Lee 742

D. The search for natural parents or child 744

Child Welfare Act 744
Ferguson v. Director of Child Welfare 746

E. Access 756

C.G.W. v. M.J. et al 756
Williams v. Hillier and Hillier 760

V. The Parental-Child Relationship 766

A. Parental Control 766

Re D. 767

B. Economic Relations 770

(1) Parental obligations to child 770

(a) General 770

Ontario Law Reform Commission, "Report on the Age of Majority" 770

(b) Legislative framework 773

Family Law Reform Act 773
Child Welfare Act.....777
Divorce Act 778

(c) The work of the courts 779

Waters v. Nicholls 779
Re Dolabaille and Carrington 781
Clark 784
Janzen 786
Harrington 788
Gartner 790
Hock 792
Walls v. Hanson 794

(d) The effect of death 795

Succession Law Reform Act 795
Re Pfrimmer 802

(2) The child's duty to maintain his parents.....803

Family Law Reform Act 803
Succession Law Reform Act 805

CHAPTER SIX: PROTECTION OF THE FAMILY UNIT AGAINST INTERFERENCE BY THIRD PARTIES

I. Between Husband and Wife 808

Ontario Law Reform Commission Report on Family Law, Part I: Torts 808

Kelly, "The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship" 814

Leaphart and McCann, "Consortium: An Action for the Wife" 818
Ontario Law Reform Commission Report on Family Law, Part I: Torts 824
Family Law Reform Act 827

II. Between Parent and Child 827

Ontario Law Reform Commission Report on Family Law, Part I: Torts 827
Family Law Reform Act 830

CHAPTER ONE: INTRODUCTION

I. The Constitutional Framework: Division of Powers and Charter of Rights

The Constitution Act allocates exclusive legislative power over some aspects of family law to the provinces and over others to the federal government. It is questionable whether the allocation is rational.

The provinces have exclusive legislative power in relation to

- solemnization of marriage [s.92(12)]
- property and civil rights [s.92(13)]
- charities [s.92(7)]
- the administration of justice within the province [s.92(14)]
- the appointment of judges of inferior courts [s.92(14); 96]

The national government has exclusive legislative power in relation to

- marriage and divorce [s.91(26)]
- criminal law [s.91(27)]
- the appointment of judges of the superior courts [s.96]

We have referred to the provinces' exclusive legislative power in relation to the appointment of judges of inferior courts and the central government's exculsive legislative power in relation to the appointment of judges of superior courts. The Supreme Court of Canada recently had to consider whether the action of British Columbia in vesting adoption and other jurisdiction in its provincial court judges was ultra vires. See Re Family Relations Act of B.C. (1982) 40 N.R. 206.

Several cases decided by the highest courts have turned on the constitutional issue, e.g. Kerr, referred to in Chapter Two. The division of powers between the federal and provincial governments has forced legislative draftsmen into some awkward corners. For example, section 20 of Ontario's Family Law Reform Act requires the suspension of any application for support or custody under that Act, if an action for divorce is commenced under the federal Divorce Act. While satisfying constitutional dictates, this provision has caused confusion and has resulted in tactical manouvering by counsel. (See also the Family Relations Act (B.C., ss. 5-8). For a recent discussion, see Colvin, Family Maintenance: The Interaction of Federal and Provincial Law (1979), 2 Can. J. Fam. L. 22]

CHAPTER TWO: FORMATION OF THE FAMILY UNIT AND ANNULMENT

"Let's buy the American dream together."

• •

I. Introduction

The material in this chapter deals with the following problems:

(a) which jurisdiction - the provinces or the federal government - has the power to formulate the conditions that must be met before a marriage may be celebrated?

(b) what conditions must be satisfied before a legally valid marriage is created and what is the effect of a failure to meet these conditions?

CHAPTER FOUR: ECONOMIC RELATIONS BETWEEN "SPOUSES"

I. Introduction

NEW YORKER 19 April/64 p42

"When you wake up, you will be generous. Very, very generous."

In this chapter we examine the two basic aspects of the economic relations between husband and wife, and peripherally, between unmarried cohabiting couples. These aspects are:

(1) property rights
(2) maintenance (support) obligations

The law in this area has undergone very significant changes in the last few years. The major change has been legislative as exemplified by the Family Law Reform Act which came into force in 1978. The F.L.R.A. changed the law relating to maintenance (support) as well as to property.

Other changes have been made by the courts. The most important of these has been the development of the constructive trust concept by the Supreme Court of Canada. See Murdoch, Pettkus v Becker and Leatherdale reproduced infra.

As a result of these changes unmarried cohabitees now have some (but not all) of the rights and obligations of married persons; women who are not in the labor market are now accorded more property rights. The question to be determined in whether more change is still needed.

To answer that question requires that you examine two basic assumptions of our present legal system: that marriage (or now, in certain cases, cohabitation) imposes economic obligations on the parties to it and that the state provides help to society's losers, but only as a last resort.

In your reading of the following material consider your present and future family situations and those of your clients and then attempt an assessment of our system in light of this formulation of the problem:

> "The main problem which every system...has to solve is the reconciliation of the needs of the household as an economic unit with the ideas of individual ownership on the one hand, and with the claims of the spouses' kinship groups on the other."
>
> Kahn-Freund, "Matrimonial Property Law in England," in Matrimonial Property Law (Friedmann, ed.), 287.

We consider questions of ownership of property and those of maintenance separately; we do so only for purposes of convenience. In the real world, these questions are inevitably intermingled.